

Construction: paying more than what is truly due

Just as contractors generally consider that they are underpaid for their construction works, the client (the construction employer) tends to consider that they are asked to pay too much. The complex payment mechanism for construction contracts is intended to provide clarity on what the contractor is to be paid and by when. The construction employer has, over the course of the last five years or so, been subject to the tyrannical/cash flow enhancing (depending on your standpoint) smash and grab adjudication. These of course arise when the employer fails to serve certain payment notices, serves them too late, or gets the wrong information in the notices. The employer has to pay the money claimed by the contractor – no ifs, buts or maybes. Of course that is a simplification but that is the general thrust of smash and grab, where the sums paid by an employer can be in the millions of pounds. That can be a painful lesson on the importance of issuing payment and/or pay less notices for any employer. Smash and grabs can arise between any construction payee and payer such as main and sub-contractors. This note refers only to the contractor and employer for the sake of brevity.

Following upon the landmark decisions in **Grove -v- S&T** in the Technology and Construction Court (TCC) and the Court of Appeal, the law now appears well settled that a smash and grab adjudication can be revisited by the employer for a true valuation. The sting in the tail for any employer on the wrong side of a smash and grab adjudication is that the sum ordered in the smash and grab adjudication must be paid first before true valuation adjudication can take place. In short, the employer may have to make a substantial payment out before having to try to get it back.

There is a further complexity as to when the true valuation can commence. The legal authorities are not as clear on this as is sometimes presumed. The case authorities may suggest that a true valuation cannot be **commenced** until the smash and grab has been paid. On the other hand, there is also some indication that the true valuation adjudication cannot be **relied upon** (implying that it can be commenced prior to the payment of the true valuation). Some of the clarification that we hoped to receive from a Supreme Court in *Grove -v- S&T* won't be forthcoming, as that appeal is no longer proceeding.

However, in the recent case of *Broseley (London) Ltd -v- Prime Asset Management Ltd* [2020], we received further guidance as to how the TCC viewed an application by an employer to stay (freeze/postpone) enforcement of a smash and grab adjudication. In *Broseley* there had been a successful smash and grab adjudication on an interim valuation. That had not been paid by the employer. When the contractor applied to court for enforcement of its smash and grab decision of £485,216.17 plus VAT, it was accepted by the employer that there was no defence to judgement for the enforcement itself. However, the employer sought a stay of the enforcement to allow for a final account valuation. In other words, the employer tried to delay having to pay the smash and grab decision while getting a true valuation. The interesting issue here was that the smash and grab related to an interim valuation whereas the stay was being sought for a final valuation. So not a true valuation of the smash and grab interim valuation, but a true valuation of the whole account. The court, having considered the authorities, and particularly that of *Grove -v- S&T*, decided that

the adjudication process ranked behind that of the payment mechanism. That is the payment mechanism that recognises the importance of cash flow within the construction industry. For the court in Broseley that meant that an adjudicator could not consider the valuations in the final account that were part of the smash and grab interim valuation without them first having been paid. A stay of enforcement was accordingly refused.

In cash-tight COVID-19 days the issue of true valuation is likely to become even more pressing for all parties. Some employers may now have greater difficulty in funding payment of smash and grab sums that they do not consider to be due, particularly if that is outwith their funding arrangements and their funder's appetite for increased exposure to risk. The time required to prepare for a true valuation, and then to adjudicate for its recovery, can be significant. True valuation is often no quick fix to a smash and grab decision.

It seems likely that the risk of contractor insolvency will increase with employers facing a risk that recovery may not be possible at a later date. Will the cash flow of the contractor still continue to be king? Perhaps in the future the court might consider appropriate security from a contractor whose financial position does not appear strong. That would require a change in approach by the courts but we are in uncharted waters. An employer who considers such an approach will have to move quickly. Whether the government will now take further steps to clarify the law in relation to smash and grab and true valuation remains to be seen. It is an area where some further clarification would be of assistance and there is an on-going consultation process for the existing legislation. In the meantime, all construction payers whether employers or main contractors are strongly encouraged to issue valid notices to avoid smash and grab payment claims.

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